contract for food—." The court strongly leaned toward the position that the transaction was a "sale," but held that, in any event, it was a *contract* to furnish food, which contract impliedly contained a term that the food should be fit for use. In a somewhat startling case of the same year, *Barrington* v. *Hotel Astor* (July, 1918), 171 N. Y. S. 840, such a transaction was held unqualifiedly to be a sale. The plaintiff had ordered kidney saute in the defendant's restaurant and was made violently sick by the discovery therein of a mouse, chopped in two. There was no direct proof of negligence, indeed the defense was that plaintiff had "planted" his own mouse in the dish with a view to such a suit. The court held that "under modern conditions the food is sold and the hotel keeper impliedly warrants that it is wholesome to eat". Thus New York and Massachusetts seem fairly well settled on both theories, but otherwise the whole result is Biblical, authority for both sides upon either theory. J. B. W.

BURDEN OF PROOF.—The case of *Rowe, Admx.* v. *Colorado and Southern R. R. Co.* (Tex. Civ. App. 1918), 205 S. W. 731, is typical of the confusion all too common in the use of this term "burden of proof".

Mrs. Rowe, as administratrix of her deceased husband, brings her action to recover against the Railroad Company, for the benefit of herself, as widow of deceased, and their minor children, for the injury resulting from the death of her husband, upon the theory that the death was caused by the negligence of the defendant companies.

The negligence charged was defective condition of a car loaded with coal, and absence of proper inspection which would have discovered the defect. The court of Civil Appeals, in an opinion granting a new trial upon the application of the plaintiff, uses the language following: "The question of whether or not the car was inspected before being placed in charge of the train crew, was a fact lying peculiarly within the knowledge of the appellees, (Railroad Company), and the burden of proving it rested on them". It is a real misfortune that the use of this term "burden of proof" in legal discussion can not be confined to a single legal concept embodying a definite legal principle. One had reason to expect that the mass of enlightening discussion of this question in recent years would find its reflection in the opinions of the courts of last resort. It is still difficult to discover that it has had any marked effect. We still can find many illustrations of its use in very different senses.

It is not clear in what sense the court used the term in the case under discussion. Did the court in its use of the term mean that if there were no evidence offered by either party from which it could be determined whether or not the car was inspected, that the jury should be advised that it should find that it was not inspected because the burden was on the defendants to prove inspection? Or, if evidence were offered by both parties on this issue, did the court intend by what it said, to indicate that if the jury were to find such evidence so evenly balanced as that it could not tell where the preponderance did lie, it would be the duty of the jury to find that there was no

inspection because the defendants had failed to lift the burden which was theirs? If such be the meaning of what the court says, it is a declaration that the jury is to determine that the defendants are liable in plaintiff's action for negligent injury although it is unable to find they were guilty of the negligence charged. In the clause immediately following the one quoted the court goes on to state that the plaintiff did introduce evidence from which the jury would be justified in concluding that the car was not inspected.

It must be concluded then that the court does not use the term "burden of proof", as indicating the obligation which a party to civil litigation takes upon himself to establish those facts essential to his cause of action or affirmative defense, by a preponderance of evidence, or be defeated of his cause of action or defense. As already indicated, it is difficult to attach any definite meaning to the words as used in the opinion in this case. Apparently the court is saying that some legal effect in the field of evidence is to be given to the fact that the means of proof of a particular fact are more accessible to one party than to the other. But what legal effect? Is it more than that the jury would be justified in taking something against a party shown to be in possession of evidence if he shall fail to produce it?

Because no one may know so well as the defendant whether he be guilty of the murder charged against him, are we to say that he shall have the burden of showing that he is innocent? Are we to say that because no one knows so well as the defendant whether he is the author of a libellous publication, that he is to be found guilty though no evidence be produced against him? No more is it true that because no one may know so well as the defendant whether he inspected a car wheel on a particular occasion, in an action charging him with that failure and depending upon proof of that fact, it is to be found that he did not inspect it though no evidence be produced upon the question.

It may well be said, that if there is evidence upon the question, that the fact that the defendants are shown to be in better position than the plaintiffs to know whether there was inspection and to produce evidence of it, a failure on their part to do so might be considered by the jury, with the other evidence, in determining whether there was, or was not inspection. In other words the instruction might, under such circumstances, be justified, that the jury might find there was no inspection upon evidence having less probative value than would be justifiable if the contested fact were not one, the evidence of which was peculiarly within the knowledge and control of the defendants.

Let us not give over pleading for the recognition, in all authoritative declarations of law, of a single definite meaning for the term "burden of proof". It would be a real service to procedural law if so desirable a result could be accomplished.

As previously indicated, that meaning of the term most nearly correct theoretically, and best supported upon authority, is one making it stand for the legal concept that parties in civil cases must establish their causes of action or defenses by a preponderance of the evidence; that an affirmative defense of a defendant in a criminal case must be established under the

same rule, and that the State must establish the facts essential to the guilt of the crime charged by evidence which satisfies the jury beyond any reasonable doubt.

The case of *Lisbon* v. *Lyman,* 49 N. H. 553, well illustrates a discriminating use of the term. Excellent discussions upon principle and authority can be found in *Thayer's Preliminary Evidence at the Common Law,* p. 353, and in Wigmore's Evidence, §§ 2483 et seq. V. H. L.

THE WRITING REQUIRED TO ESTABLISH AN EXPRESS TRUST OF LAND.—It has frequently been said that the Seventh Section of the Statute of Frauds, concerning Trusts of land, requires a writing containing "all the terms of the trust." *Forster* v. *Hale,* 3 Ves. 707; *Smith* v. *Matthews,* 3 DeG., F. & J. 139; *Loring* v. *Palmer,* 118 U. S. 321; *Gaylord* v. *Lafayette,* 115 Ind. 423; *McClellan* v. *McClellan,* 65 Me. 500; *Blodgett* v. *Hildreth,* 103 Mass. 484; *York* v. *Perrine,* 71 Mich. 567; *Newkirk* v. *Place,* 47 N. J. Eq. 477; *Steere* v. *Steere,* 5 Johns. Ch. 1; *Cook* v. *Barr,* 44 N. Y. 156; *Dillaye* v. *Greenough,* 45 N. Y. 438; *Dyer's Appeal,* 107 Pa. 446; *McCandless* v. *Warner,* 26 W. Va. 754. This doctrine comes to the test in a case where there is a writing, signed by the person who is enabled to declare the trust, sufficiently identifying the land, and declaring that it is held in trust, but without naming the beneficiaries or otherwise failing to meet the stated requirement, but where parol evidence sufficiently establishes the terms of the trust to enable the court to enforce it if the Statute does not prevent. In such a case, does the Statute render the trust unenforcible? It is submitted that it does not.

The policy of the Statute of Frauds is to prevent frauds through perjury, not generally but in particular classes of cases, selected and defined, we must assume, upon the theory that such frauds are more likely in these than in other cases, or would in these, if perpetrated, be more than commonly obnoxious, or that, in these cases, the imposition of the statutory requirements upon an honest claimant would involve less than ordinary hardship. The method adopted to prevent such frauds in such cases is to relieve the putative victim from the necessity of meeting and disproving a claim supported only by parol, and presumably perjured, evidence, requiring in such cases higher evidence, usually a writing over the signature of the putative victim. The Statute is extremely concise, considering the complexity of the problems touched by it, and leaves much to judicial interpretation, as to the cases embraced, the character of the writing required, and otherwise. Such interpretation should obviously proceed with the policy of the Statute clearly in view.

The provisions touching trusts of land would seem to be designed to protect the beneficial owner from expropriation by judicial proceedings based on perjured parol evidence of a declaration of trust. If this be so, the only writing required to effectuate the policy of the statute is one identifying the land and clearly indicating that the person alleged to be a trustee has no beneficial interest therein, or only a specified interest. This position is squarely denied in *Smith* v. *Matthews, supra.* There counsel argued, "the